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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-976

TED F. DUNHAM, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 501 F. 2d 80. The opinion of the district court (Pet. App. 9a–36a) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1974. A timely petition for rehearing was denied on November 13, 1974. The petition for a writ of certiorari was filed on February 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to entertain an appeal by the government from a district court order vacating a conviction and granting a new trial under 28 U.S.C. 2255.

2. Whether the court of appeals properly concluded that it was harmless error for the trial court to use a verdict form, prepared by defense counsel, which incorrectly described the offense charged.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix B of the petition.

STATEMENT

On June 20, 1969, a grand jury returned a five-count indictment against two individuals—Ted F. Dunham, Jr. and Edward Grady Partin—and three corporations—Dunham Concrete Products, Inc., Louisiana Ready-Mix Company, Inc., and Anderson-Dunham, Inc. The indictment alleged violations of the Hobbs Act, 18 U.S.C. 1951, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (J.A. 32–47).[1]

Dunham and the corporate defendants were tried in New Orleans, Louisiana, in January and February, 1971.[2] The evidence demonstrated that by Dunham's "procurement, persons who patronized his competitors suffered labor difficulties unrelated to any legitimate

[1] "J.A." refers to the Joint Appendix filed in the court of appeals in connection with the appeals from the district court's order filed on February 4, 1974.

[2] Partin was tried separately. Partin's fourth trial is scheduled to commence on April 28, 1975.

labor grievance, destruction of thousands of dollars worth of concrete pipe, assaults by gangs of thugs employing clubs, chains and shotguns, etc." (Pet. App. 2a, n. 1).

District Judge Murray, who presided at the trial, met with counsel at the conclusion of the evidence and prior to instructing the jury. At the conference, James P. McPherson, one of petitioner Dunham's attorneys, submitted a suggested verdict form which described the counts as follows (J.A. 54–57):

> Count 1—Conspiracy to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1);
>
> Count 2—Conspiracy to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2);
>
> Count 3—Conspiracy to attempt to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2);
>
> Count 4—Conspiracy to extort (18 U.S.C. 1951);
>
> Count 5—Conspiracy to attempt to extort (18 U.S.C. 1951).

One of the government attorneys objected to the description of Count Three contained in the verdict form and said it should read "attempt to monopolize" rather than "conspiracy to attempt to monopolize." Mr. McPherson argued that his form was correct. Another government attorney suggested "attempt to monopolize by co-conspirators" as an alternative (Pet. App. 7a). Judge Murray decided to use the McPherson form (Affidavits of Thomas P. Ruane and James D. Carriere, J.A. 165–168).

Judge Murray gave the jury lengthy instructions with respect to each count (J.A. 121–139). He also read the verdict form to the jury (J.A. 141). The next morning he sent the indictment to the jury and told them that any time they reached a verdict as to any defendant or any count "you may return your verdict to the court" (J.A. 143–144).

Later in the day, the jurors advised the judge that they had found Dunham guilty on Count Three (J.A. 146). When the jury returned again, defense counsel asked the court to instruct the jurors that "the preliminary verdict they sent to you in the form of a written memorandum is not a binding verdict" (J.A. 146). Judge Murray complied with this request. When the jurors submitted the verdict forms which the court had provided, Count One was marked Not Guilty, Counts Three and Five were marked Guilty, and Counts Two and Four were blank (J.A. 54–57). Petitioner Dunham was fined $30,000 and sentenced to six months' imprisonment on Count Three and was fined $10,000 and sentenced to three years' imprisonment on Count Five, with two and one-half years of that sentence suspended; the sentences of imprisonment were to run consecutively. The corporate defendants were fined a total of $120,000.

A notice of appeal was filed on behalf of all four defendants, but the appeals of Louisiana Ready-Mix and Dunham Concrete Products were dismissed for lack of prosecution. The court of appeals affirmed the convictions of Dunham and Anderson-Dunham, Inc. (475 F. 2d 1241), and this Court denied Dunham's

petition for a writ of certiorari (414 U.S. 832). None of the defendants raised any question with respect to the sufficiency of the indictment, the instructions, or the verdict form in any of the proceedings on direct appeal.

Dunham and the corporate defendants filed several motions for relief in the district court before the certiorari petition was denied. Two of those motions asserted that the convictions were invalid because the defendants had been convicted of nonexistent offenses. The district court issued an Order and Memorandum (Pet. App. 9a–36a) vacating Dunham's conviction and ordering a new trial pursuant to 28 U.S.C. 2255 and denying all of the corporate defendant's motions.

The district court rejected Dunham's contention that a concerted attempt to monopolize cannot be prosecuted as an attempt to monopolize and expressly held that "both the indictment and the instructions to the jury in this case were correct" (Pet. App. 18a). It observed, however, that the verdict form did not properly describe the offense charged in Count Three of the indictment because it speaks of "conspiracy to attempt rather than an attempt to monopolize by the means alleged in the charge of conspiracy" (Pet. App. 19a). The court said that this erroneous description "presents the possibility" that the jury was confused by the language of the verdict form and therefore convicted Dunham of "conspiracy to attempt," which does not constitute an offense under the Sherman Act (*ibid.*). The court added that the description

of Count Five in the verdict form presents the same problem (Pet. App. 19a–20a).[3]

The district court declined to set aside the convictions of the corporate defendants because Section 2255 does not provide a remedy for them and the *coram nobis* remedy is normally restricted to an error of fact which is extrinsic to the record (Pet. App. 23a–28a).

Both the government and the corporate defendants appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals reversed the district court's decision to vacate Dunham's conviction and affirmed the decision to deny relief to the corporate defendants (Pet. App. 1a–8a). It first rejected Dunham's contention that the government is not entitled to appeal a Section 2255 order which permits a retrial of the defendant (Pet. App. 3a–4a) and then concluded that the trial court's error in submitting erroneous verdict form language to the jurors was harmless beyond a reasonable doubt (Pet. App. 4a–8a).[4]

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[3] The court rejected the government's contention that Dunham should not be permitted to rely upon errors in the verdict form language because his attorney drafted the form (Pet. App. 23a): "Even though it appears that petitioner's counsel authored the ambiguous verdict form, it must be remembered that it was approved by the court and that it is the petitioner himself who will serve a jail sentence. At any rate, no amount of improper activity on the part of petitioner's counsel will suffice to create a federal offense where Congress has not. When events conspire to that end, justice will not be deterred by the possible existence of questionable trial tactics."

[4] The government also contended that Dunham was not entitled to Section 2255 relief because he cannot rely upon errors created by his own attorney, he failed to demonstrate the absence of a deliberate by-pass of his direct appeal remedies, and

ARGUMENT

1. Because a proceeding under 28 U.S.C. 2255 is civil in nature, the losing party—even if it is the government—has a right to appeal. See *United States* v. *Williamson*, 255 F.2d 512, 515–516 (C.A. 5), certiorari denied, 358 U.S. 941; 2 Wright, *Federal Practice and Procedure*, § 601, p. 639 (1969). Indeed, petitioners do not dispute the general proposition that the government may appeal from the grant of a Section 2255 motion, but contend only that an order vacating a criminal conviction and granting a new trial is not a final order and is therefore not appealable.

Both the court below and the United States Court of Appeals for the Tenth Circuit have properly rejected this contention. See *United States* v. *Kelly*, 269 F.2d 448 (C.A. 10). An order vacating a conviction and granting a new trial is, we submit, a final order; and no useful purpose would be served by depriving the government of an opportunity to seek review of such a decision. As the court below stated (Pet. App. 3a–4a):

> * * * This Circuit has long taken the view that § 2255 proceedings are, like habeas matters, civil actions mainly standing on their own bottoms and that when an order is entered in the § 2255 proceeding which satisfies established notions of finality, either party prejudiced may appeal as in other civil actions. United States v. Williamson, 255 F.2d 512, 515–516 (5th Cir.

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the erroneous description of the offenses in the verdict form is not a constitutional defect. The court of appeals did not decide those questions because its harmless error ruling made it unnecessary to do so (Pet. App. 7a–8a).

> 1958), cert. denied 358 U.S. 941, 79 S.Ct. 348, 3 L.Ed.2d 349 (1959). What results is no more a piecemeal appeal than a § 2255 proceeding is a piecemeal trial. Other circuits have taken similar views, e.g. Gray v. Swenson, 430 F.2d 9 (8th Cir. 1970); United States v. Kelly, 269 F.2d 448 (10th Cir. 1959).
>
> * * * * *
>
> In our case the § 2255 proceedings have ended with an order requiring the Government, if it wishes to persist in an effort to punish Dunham, to return to Square One and recommence its effort ab initio. A more final termination of the § 2255 action can scarcely be imagined; what possible further purpose could it serve? We have jurisdiction.

The decision of the court below is consistent with this Court's decision in *Andrews* v. *United States*, 373 U.S. 334. Section 2255 authorizes a district court to do one of four things: It can discharge a prisoner, or resentence him, or grant him a new trial, or correct his sentence. The district court in the *Andrews* case had not done any of those things; it had merely decided that the prisoner should be resentenced, but had not yet done so. This Court accordingly concluded that the Section 2255 proceeding had not been completed.

Nor is the decision below inconsistent with *Collins* v. *Miller*, 252 U.S. 364. *Collins* involved a single judgment in a *habeas corpus* proceeding brought by a petitioner who had been detained on three warrants of arrest based on three separate affidavits. Since the writ was denied as to one affidavit but granted and remanded for further proceedings as to the others,

this Court concluded that only one branch of the case had been finally disposed of and it was therefore non-reviewable. The *Collins* opinion expressly distinguished earlier "conditional order" cases in which the writ was granted subject to further proceedings in a different tribunal (252 U.S. at 368).

The decision below is also consistent with the procedure which traditionally has been followed in *habeas corpus* proceedings. Courts often grant substantially the same relief to state prisoners by ordering that the prisoner be discharged subject to the state's right to retry him. Such orders are routinely appealed. See, *e.g., Sheppard* v. *Maxwell*, 346 F. 2d 707 (C.A. 6), reversed on other grounds, 384 U.S. 333.

Moreover, petitioners are incorrect in alleging a conflict between the decision below and that of the Tenth Circuit in *Kelly*, on the one hand, and decisions of the United States Court of Appeals for the Second Circuit, on the other. While the Second Circuit has declined to review some conditional release orders in deportation and extradition cases (*e.g., United States* v. *Shaughnessy*, 178 F. 2d 756 (C.A. 2); *United States* v. *Bishopp*, 286 F. 2d 320 (C.A. 2)), these decisions are not applicable to a *habeas* order directing the release of a person convicted of a criminal offense subject to a retrial. See *United States ex rel Reid* v. *Richmond*, 295 F. 2d 83, 84–85 n. 2 (C.A. 2), certiorari denied *sub nom. Reid* v. *Richmond*, 368 U.S. 948. Indeed, subsequent to the Second Circuit decisions relied upon by petitioners (see *United States* v. *Curran*, 18 F. 2d 953 (C.A. 2); *United States* v. *Bishopp*, *supra*), that court has permitted appeals from a vari-

ety of conditional *habeas corpus* orders in cases involving persons who have been convicted of crimes in state courts. See, *e.g., United States ex rel Brown* v. *Smith,* 306 F. 2d 596 (C.A. 2); *United States ex rel Mitchell* v. *Follette,* 358 F. 2d 922 (C.A. 2); *United States ex rel Curtis* v. *Zelker,* 466 F. 2d 1092 (C.A. 2). Thus, the most recent Second Circuit decisions demonstrate that the Second Circuit would have reached the same result as the Fifth Circuit had the instant case been presented to it for decision. Therefore, there is no conflict between the circuits meriting the attention of this Court.[5]

2. The decision below with respect to the merits of petitioner Dunham's claim does not present any question warranting further review. The court of appeals was convinced "beyond a reasonable doubt" that the defective description of the offenses in the verdict form did not contribute to petitioner's convictions (Pet. App. 7a–8a). This is the proper standard for determining whether an error is harmless. See *Chapman* v. *California,* 386 U.S. 18; *Harrington* v. *California,* 395 U.S. 250; *Milton* v. *Wainwright,* 407 U.S. 371. Moreover, the harmless error determination here involved a particularly unusual set of circumstances, and the novel language of the verdict form is not likely to reappear in future cases.

The court of appeals correctly held that there is no reasonable possibility that the erroneous verdict form language contributed to the convictions on Counts

[5] There may be a conflict between different Second Circuit decisions in *habeas corpus* cases, but any such conflict should be resolved by that court in a *habeas* case.

Three and Five, charging attempt to monopolize and attempt to extort, respectively. The court's instructions on these counts were accurate and complete (see J.A. 121–139), and the indictment, which correctly described the offenses (J.A. 32–47), was sent to the jury room to aid the jury in its deliberations. There is no reason to believe that the jury ignored the instructions and the allegations of the offenses as set forth in the indictment, and rested the verdicts instead on the language of the verdict form. As this Court has said: "Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face." *Schneble v. Florida*, 405 U.S. 427, 431–432.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
CARL D. LAWSON,
Attorney.

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